Supreme Court, U.S.
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No. 92-276

In The

Supreme Court of the United States

October Term, 1992

MARIE M. KRIETER, TRUSTEE,

Petitioner,

vs.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH; Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,

Respondent.

On Petition for Writ of Certiorari to the Third District Court of Appeal for Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under the circumstances in this case, the riparian owner's request to construct a wharf on sovereign submerged lands within a state park is subject to the public's interest pursuant to the Public Trust Doctrine?

PARTIES TO THE PROCEEDING

The Petitioner's description of the parties below is essentially correct. In addition, on January 22, 1992, the Florida Audubon Society filed with the Third District Court of Appeal of Florida its ". . .Motion For Leave To Participate As An Amicus Curiae" in support of Respondent. That motion was denied as moot on March 11, 1992, subsequent to the court's opinion of February 11, 1992.

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Statute Cited:

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Rule Cited:

United States Supreme Court Rule 15.2 2

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Lawton Chiles, Governor of the State of Florida; Jim Smith, Secretary of State; Bob Butterworth, Attorney General; Gerald Lewis, Comptroller; Tom Gallagher, Treasurer; Bob Crawford, Commissioner of Agriculture; and Betty Castor, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, urges

the Court to deny the petition for writ of certiorari to review the judgment and opinion of the Third District Court of Appeal of Florida entered on February 11, 1992.

OPINIONS BELOW

The order of the Supreme Court of Florida denying the petition for review has not been reported, but is reprinted as Petitioner's Appendix A. The opinion of the Third District Court of Appeal of Florida is reported at 595 So.2d 111 (Fla. 3rd DCA 1992), and is reprinted as Petitioner's Appendix C. The order of the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida has not been reported, but is reprinted as Petitioner's Appendix D.

STATEMENT OF JURISDICTION

The Respondent's brief in opposition is filed within thirty days after receipt of the petition for writ of certiorari pursuant to United States Supreme Court Rule 15.2.

The Court's jurisdiction has been invoked by the Petitioner pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved have been adequately set forth in the petition for writ of certiorari filed by the Petitioner.

STATEMENT OF THE CASE

Petitioner's Statement of the Case necessitates the following corrections and clarifications.

At the trial court level, this matter proceeded no further than

the pleading stage. Respondent's motion to dismiss (for failure to state a cause of action) addressed the contention in the complaint that Petitioner Marie M. Krieter possessed an absolute riparian right to construct a dock on sovereign submerged land. The trial court disagreed and held that ". . . Plaintiff does not possess the unqualified right to build a wharf or dock." Further, the trial court granted Petitioner twenty (20) days within which to amend her pleadings. Petitioner declined to amend, and on August 19, 1991 the trial court entered its final order of dismissal.

Because no evidence or testimony was ever submitted at the trial court level, the "facts" submitted by Petitioner are not facts at all; rather, most are restated allegations from the complaint, some are new allegations raised for the first time in the petition before this Court, and others are incomplete in their restatement. Because a complaint attacked for insufficiency is generally regarded in the light most favorable to the plaintiff, these discrepancies are for the most part of no consequence to the issue before this Court. However, Respondent's written denial of consent to build a dock dated December 18, 1990, contained the following second basis for denial not noted in Petitioner's Statement of the Case: a duly enacted rule of the Division of Recreation and Parks of the Department of Natural Resources of the State of Florida which prohibited construction within the boundaries of John Pennekamp Coral Reef State Park.

Respondent has also restated the Question Presented For Review submitted by Petitioner, partially to more accurately reflect the proceedings below and the question before this Court, and further, to eliminate the representation therein that no environmental harm would result from construction of the dock, a contention neither germane to these proceedings nor founded in fact.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *YATES V. CITY OF MILWAUKEE*, 77 S.CT. 497 (1870).

Petitioner contends that the opinion of the Third District Court of Appeal of Florida is in direct conflict with this Court's opinion in *Yates v. City of Milwaukee*, 77 S. Ct. 497 (1870). Petitioner first relies upon the following portion of *Yates*:

> But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, *subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the* public, whatever those may be.

Id. at 504 (emphasis added).

As evident in the above-quoted language, and in a line of opinions both antecedent and subsequent to *Yates*, the Court has consistently recognized the qualified nature of the riparian privilege to wharf out. *See, e.g., Dutton v. Strong*, 66 U.S. 2 (1861); *Weber v. State Harbor Commissioners*, 85 U.S. 57 (1873); and, *United States v. River Rouge Improv. Co.*, 269 U.S. 410 (1975). In *River Rouge*, the Court found that the right of access

remains in the riparian owner *until taken away by the government in the due exercise of its powers. River Rouge*, 369 U.S. at 420. The Court further explained its position as follows:

> It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable right he has, in addition to the rights common to the public, a property right incident to the ownership of the bank, of access from the front of his land to the navigable part of the stream, *and when not forbidden by public law* may construct landings, wharves or piers for this purpose.

Id. at 418 (emphasis added).

Consonant with *Yates*, the opinions of the Court referenced above, and the Public Trust Doctrine, the Third District Court of Appeal of Florida found the Petitioner's privilege to wharf out to be subject to rules duly imposed by the state of Florida for the protection of the rights of the public.

As further confirmation of the consistency of the decision below with *Yates*, the Court's position on this issue was further elucidated in the case of *Scranton v. Wheeler*, 179 U.S. 141 (1900). In *Scranton*, the Court addressed whether a taking had occurred where a riparian owner's access from his land to navigability was lost because the United States had constructed a pier resting in front of the owner's upland for the purpose of improving navigation. The plaintiff argued that he was entitled to compensation pursuant to *Yates*. *Id.* at 157. However, the Court found that *Yates* was inapplicable and distinguished *Yates* as follows:

> That, as we have seen, was a case in which the riparian owner had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation, a right never exercised by him in the construction of a wharf before the improvement in question was made by the government.

Id. at 158. *Yates* can be similarly distinguished from the facts in the case at bar.

Additionally, in *Scranton*, the Court explicitly set forth its position regarding alleged riparian rights in state-owned submerged lands:

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water.

> It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Id. at 163.

The Petitioner next relies upon the following portion of *Yates:*

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Yates, 77 S. Ct. at 504. Again, the opinion of the Third District Court of Appeal of Florida on this issue is consistent with *Yates*, as evidenced by the following portion of this Court's opinion in *Scranton:*

> If the riparian owner cannot enjoy access to navigability and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case "in due subjection to the rights of the public," — *an injury resulting incidentally from the*

> *exercise of a governmental power for the benefit of the general public and from which no duty arises to make or secure compensation to the riparian owner.*

Id. at 164 (emphasis added). In *Scranton*, the Court found that the government action was not arbitrary and capricious and no compensation was due the riparian owner. *Id.* Similarly, in the case below, the state's denial of Petitioner's qualified privilege to wharf out resulted incidentally from the exercise of the state's power to act for the benefit of the general public and no duty to provide compensation arose therein.

Petitioner's argument is essentially that she has the unfettered right to sink pilings in the public's land and to construct a dock over the public's land regardless of the public trust and the superior rights of the public thereunder. However, under the circumstances herein, the Trustees correctly did not consent to the use of the public's property for a private dock. The opinion of the Third District Court of Appeal of Florida is entirely in harmony with *Yates* in finding that Petitioner's qualified privilege to wharf out was subservient to the public's interests pursuant to the Public Trust Doctrine.

The Petitioner cites as further authority this Court's recent opinion in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). However, the Petitioner has never argued, as was argued in *Lucas*, that she was deprived of all economically beneficial use of her property. The state has never required that Petitioner leave her property "economically idle." Rather, the Petitioner's position has always been that she was deprived of her alleged unqualified right to wharf out and she has not argued that the Respondent has in any other way interfered with her riparian or property rights. The Court's decision in *Lucas* is thus inapplicable to this matter.

Petitioner also references the case of *State of Florida v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976). The Petitioner is incorrect in stating that in *Florida National Properties* the Florida Supreme Court held that the matters therein were controlled by ancient common law and Federal law. Rather, the trial court stated that the matters were governed by federal law, *id.* at 17, while the Florida Supreme Court stated that ancient common law prevailed. *Id.* at 18.

The Petitioner's implication that the state of Florida has ignored this Court's decision in *Yates* is clearly untrue. The *Yates* decision was considered long ago by the Florida Supreme Court in the case of *Thiesen v. Gulf, Florida and Alabama Railway*, 78 So. 491 (Fla. 1917).

In *Thiesen*, the defendant railroad began filling and laying tracks waterward of Thiesen's adjoining riparian property. Thiesen filed suit and complained that he enjoyed a common law right to ingress and egress and also enjoyed the right to construct and maintain wharfs, piers, docks and bath houses on the water. The court conceded that the right of ingress and egress was a common law riparian right, together with an unobstructed view over the water, and in common with the public the right of navigating, bathing and fishing. *Id.* at 501. However, the court severely questioned Thiesen's contention that as a riparian owner he also had the right to build and maintain wharfs, piers and bath houses. *Id.* The court embarked upon a discussion designed to analyze this question and in so doing referred to *Yates*. The *Thiesen* court stated:

> But that *case [Yates] does not recognize the right of the riparian owner to build wharfs beyond the low water mark to the channel.* In the case of *Saint Anthony Falls Water Power Co. v. Saint Paul Water Commissioners*, 168 U.S. 349, 18 Sup. Ct. 157, 42 L.Ed. 497, the

> court was of the opinion that the *property rights of a riparian owner of land on navigable waters are to be measured by the rules and decisions of the state within whose boundaries the particular land lies.*

Id. at 502 (emphasis added).

The *Thiesen* court consulted numerous opinions of this Court subsequent to *Yates* and confirmed that *Yates* was not only inapplicable to the matter, but that it was the right of each state to determine the extent of the title and rights of riparian owners within that state. *Id.*

The opinion of the Third District Court of Appeal was a well-reasoned decision resulting in a holding consonant with the opinions of this Court and of the courts of Florida.

II.

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONCERNING THIS PARTICULAR QUESTION.

A. Other State Courts

The Petitioner contends that it is relevant to this Court's determination whether the decision below conflicts with the outcome of the decisions of other state courts on this particular question. However, in numerous cases, this Court has consistently stated that it adheres to the principle that "[i]t is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders

and the riparian lands adjacent to them." *Arkansas v. Tennessee*, 246 U.S. 158, 175 (1918). "The title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted to the United States by the Constitution." *Shively v. Bowlby*, 152 U.S. 1 (1893); *see also, St. Paul & P.R. Co. v. Schurmeier*, 74 U.S. 272 (1868); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Hardin v. Jordan*, 140 U.S. 371 (1891); and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

In *Shively* the Court reviewed a quiet title action in Oregon. After summarizing the laws of the original states regarding the scope of public and private rights in lands below the high water mark of navigable waters, the Court noted that:

> [T]here is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.

Shively, 152 U.S. at 26. Citing its decisions in *Dutton, Schurmeier* and *Yates*, the Court stated that it distinctly recognized the diversity of laws and usages in the different states upon this subject and that "different states adopted different regulations upon the subject." *Id.* at 36. The Court found that none of the three cases called for the laying down or defining of any general rule independent of local law or usage or of the particular facts before the court. *Id.* at 37.

In each of the cases cited by Petitioner, the courts noted the distinctive nature of its state's law regarding riparian rights. In *Town of Orange v. Resnick*, 109 Atl. 864 (Conn. 1920), the Connecticut Supreme Court stated, "it may be that our law as to the private rights of riparian owners is more liberal than that of some other jurisdictions." *Id.* at 866. The court again noted the distinctive nature of Connecticut's law, "[t]hus the exclusive franchise of reclamation and of wharfing out is merely a mode of exercising the right of access, and in this state at least no distinction can be drawn between them." *Id.* at 867.

In *Hilt v. Weber*, 252 Mich. 198 (1930), the Michigan Supreme Court re-examined two previous Michigan decisions in order to clarify the respective rights of the state and of riparian owners pursuant to established rules of property under Michigan law.

In *Nugent v. Vallone*, 161 A.2d 802 (R.I. 1960), the New Jersey Supreme Court recognized that the law "in this state [is] that this right to wharf out is a common-law right." *Id.* at 805. The court went on to cite *Yates* that riparian rights are "subject to such general rules and regulations as the legislature may see proper to impose." *Id.* citing *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870). However, in *Nugent*, unlike the instant case, the court noted that the New Jersey Legislature had not imposed any rules or regulations which prevented construction of the subject pier and were not contesting construction of the pier.

In *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), the California Supreme Court also relied upon *Yates* that riparian rights must be enjoyed "in due subjection to the rights of the public" and noted California law upholding this principle. Further, the court cited the law of California that "this littoral right is of course burdened with a servitude in favor of the state in the exercise of its trust powers over navigable waters." *Id.* at 382. However, in *Marks*, unlike the present case, California had not exercised this right.

B. Florida Courts

While the laws of the several states may vary on the question at issue, the only discussion of state law relevant to the question herein is the law of Florida. Although the result below may differ from the result which would have been reached by another state court, this does not create a conflict subject to review by this Court. As previously noted, the Court has consistently found that the issue herein is a matter of state choice. The Third District Court of Appeal's decision is consistent with Florida law and does not constitute a constitutional deprivation of Petitioner's rights.

In her petition, Petitioner made the following comments:

> Since the time of statehood, the Florida Supreme Court has acknowledged the riparian owner's right to wharf out.

(Petition at p. 7).

> The courts of the State of Florida have only recently equated the ownership of submerged lands with riparian rights, and for the first time have departed from a long progression of cases affirming the riparian owner's right to wharf out.

(Petition at p. 10). Petitioner has failed to cite any Florida cases to support these assertions and is unable to do so because the assertions are untrue. The decision of the Third District Court of Appeal does not constitute a departure from Florida case law but rather constitutes the continuation of a long progression of Florida cases which have affirmed that riparian owners possess the *qualified privilege* to wharf out.

In accordance with prior decisions of the Florida Supreme Court, the Third District Court of Appeal recognized that the Petitioner did not possess the unqualified right to build a wharf or dock on public land. As illustrated by the following cases, the Florida Supreme Court has consistently held that consent to the private use of public land is controlled by the Public Trust Doctrine and the constitutional mandate that such use not be contrary to the public interest. *See, e.g., Ferry Pass Inspectors and Shippers Association v. White's River Inspectors and Shippers Assoc.*, 48 So. 643 (Fla. 1909) (the Florida Supreme Court recognized that the riparian right to erect bath houses, wharves or other structures is a "privilege" subject to the superior rights of the public); *Thiesen v. Gulf, Florida and Alabama Railway*, 78 So. 491 (1917)(the Florida Supreme Court found that construction of a dock was merely a privilege exercised by riparian owners subject to acquiescence of the state); *Williams v. Guthrie*, 137 So. 682 (Fla. 1931)(the Florida Supreme Court noted that riparian owners have the right to construct wharfs from the upland to reach the navigable water when not objected to by the sovereign or specially forbidden by statute); *Adams v. Elliott*, 174 So. 781 (Fla. 1937) (the Florida Supreme Court stated that riparian owners may construct wharves for authorized purposes, as authorized by law, and that littoral rights and riparian rights are subject to lawful regulation by the state).

Consistent with Florida law and in furtherance of their fiduciary duty pursuant to the Public Trust Doctrine, the Respondent properly refused to allow Petitioner to conduct activities on sovereign submerged lands which were contrary to the public interest.

CONCLUSION

The Court has consistently found that the unfettered private use of public land is not an absolute right, but is a privilege subject to the public interest as determined according to the law of each state. The Third District Court of Appeal of Florida correctly ruled that the Petitioner does not enjoy the unqualified right to build a dock on sovereign land and that Petitioner's riparian rights are subject to the public's interest. The Respondent asks that the Court not assume jurisdiction of this matter.

Respectfully submitted,

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